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**ILLINOIS COMMERCE COMMISSION**

STATE OF ILLINOIS

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2004 APR -5 P 12: 55

CENTRAL ILLINOIS PUBLIC SERVICE )  
COMPANY, d/b/a AmerenCIPS, )

Complainant/Counter-Respondent, )

vs. )

COLES-MOULTRIE ELECTRIC )

COOPERATIVE, INC., properly known as )

Coles-Moultrie Electric Cooperative, )

Respondent/Counter-Complainant. )

CHIEF CLERK'S OFFICE

Docket No. 03-0723

**REPLY OF COLES-MOULTRIE ELECTRIC COOPERATIVE TO THE MOTION FOR  
JUDGMENT BY CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a  
AMERENCIPS WITH RESPECT TO COUNT I OF THE COMPLAINT FILED BY  
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a AMERENCIPS**

COLES-MOULTRIE ELECTRIC COOPERATIVE (Respondent/Counter-Complainant)

(CMEC) (Coles-Moultrie) herewith files its reply to the motion filed by CENTRAL ILLINOIS

PUBLIC SERVICE COMPANY d/b/a AMERENCIPS (Complainant/Counter-Respondent)

(CIPS) for judgment on Count I of the CIPS Complaint filed herein and in support thereof

states as follows:

**I. THE FACTS ARE SET FORTH IN THE CIPS COMPLAINT, COLES-MOULTRIE  
ANSWER AND COUNTER-COMPLAINT**

The CIPS Complaint taken with the Answer and the Counter-Complaint filed by Coles-Moultrie set forth the following facts with respect to the Section 7 notice:

1. Agracell, Inc. plans to develop a commercial business park called Coles Centre Business Park located in the southwest quadrant of the intersection of Illinois Route 16 and Lerna Road, Sections 16 and 21, Township Thirteen (13) North,

Range Eight (8) West, Third P.M., Coles County, Illinois and that Coles-Moultrie intends to provide electric service to that development. Coles-Moultrie gave CIPS notice of the foregoing on October 31, 2003. (CIPS Complaint, Exhibit 1)

2. Attached to the October 31, 2003 notice is a plat showing the location of Illinois Route 16 and the identification of the tract called Coles Centre, L.L.C. in Sections 16 and 21. (CIPS Complaint, Exhibit 1)
3. The aforesaid notice was provided to CIPS by Coles-Moultrie because the customer, Agracell, Inc., requested a written proposal for electric service for the aforesaid Coles Centre Business Park with construction to begin in the second quarter of 2004. (Coles-Moultrie Answer, Count I, Par. 5)

II. JUDGMENT ON THE PLEADINGS IS PRECLUDED ONCE, THE MATERIAL FACTS ALLEGED IN THE PLEADINGS ARE DENIED

Whenever a party moves for judgment on the pleadings, the trier of fact is limited to reviewing the facts as set forth in the pleadings on file, which in this case consist of the CIPS Complaint, the Coles-Moultrie Answer thereto and the Coles-Moultrie Counter-Complaint. The Motion for Judgment on the pleadings attacks only the legal sufficiency of the Complaint and is permissible only in the absence of any material issue of fact Richco Plastic Co. v. IMS Company 288 Ill. App. 3d 782; 681 N.E. 2d 56; 224 Ill. Dec. 74, 77 (1<sup>st</sup> Dist, 5<sup>th</sup> Div. 1997.)

The facts alleged in this docket show that there was a request for a proposal for electric service received by Coles-Moultrie from the customer, Agracell, Inc., requesting that Coles-Moultrie provide a proposal for electric service with the construction regarding that electric

service to begin in the second quarter of 2004. Those facts are not in dispute although CIPS in its Motion for Judgment omits the fact that the customer requested that the electric service construction begin in the second quarter of 2004. By the time Coles-Moultrie files its response to the CIPS motion and any subsequent replies thereto are filed together with any consideration of the motion and responses thereto by the Administrative Law Judge (ALJ), the second quarter of 2004 will have arrived. Accordingly, the urgency of the customer's request regarding electric service will be upon the parties to this proceeding and the Commission.

Further, CIPS has alleged in its Complaint that the customer has not made a request for electric service (CIPS Complaint, Count I, Par 6). Coles-Moultrie has denied that allegation (Coles-Moultrie Answer to Count I, Par 6). Where as in this case a material fact is placed in issue by the denial, judgment on the pleadings is precluded. Opyt's Amoco, Inc. v. Village of South Holland 209 Ill. App. 3d 473; 568 N.E. 2d 260; 154 Ill. Dec. 260, 271-272 (1<sup>st</sup> Dist. 3d Div. 1991); Judgment of the Appellate Court affirmed on appeal in Opyt's Amoco, Inc. v. Village of South Holland 149 Ill. 2d 265; 595 N.E. 2d 1060; 172 Ill. Dec. 390 (1992).

### III. THE RIGHT TO PROVIDE ELECTRIC SERVICE TO THE CUSTOMER, AGRACELL, INC., IS AT ISSUE IN THIS DOCKET

The CIPS' Motion for Judgment maintains that no contested issue is presented in this case. Nothing could be further from the truth. Section 7 of the Illinois Electric Supplier Act (220 ILCS 30/7) clearly provides that an electric supplier planning a "...proposed construction, extension or service"... for providing electric service to a customer is required to provide notice of that "...proposed construction, extension or service." That is exactly what Coles-Moultrie did in this docket. CIPS contests Coles-Moultrie' right to serve the customer yet at

the same time CIPS claims there should be no decision made as to which of Coles-Moultrie or CIPS should provide the electric service to Coles Centre Business Park.

A. THE ISSUES IN THIS DOCKET PRESENT CONTESTED ISSUES IN REGARD TO ELECTRIC SERVICE TO COLES CENTRE BUSINESS PARK

Section 3.02 of the Illinois Administrative Procedure Act defines a “contested case” as a proceeding “... in which the individual legal rights, duties or privileges of a party are required by law to be determined by an agency only after an opportunity for hearing.” (5 ILCS 100/1-30) The Illinois legislature has provided in the Illinois Electric Supplier Act 220 ILCS 30/1 et. seq. (ESA) for the Illinois Commerce Commission to decide all issues relating to which electric supplier should provide electric service to a proposed customer at a proposed location. In addition, the Illinois Commerce Commission has adopted rules of practice for adjudicating such contested matters. In this docket CIPS filed a substantive claim of right to provide electric service to Agracell, Inc. at the Coles Centre Business Park location pursuant to Section 5 of the ESA, as well as, an exclusive right to serve the customer, Agracell, Inc., at the Coles Centre Business Park by reason of the ESA. These claims are found in Count III and Count IV of the CIPS Complaint. Likewise, Coles-Moultrie has filed a Counter-Complaint seeking the right to provide electric service to Agracell, Inc. at the Coles Centre Business Park pursuant to Section 5 of the ESA (Count I of the Coles-Moultrie Counter-Complaint); pursuant to Section 8 of the ESA (Count II of the Coles-Moultrie Counter-Complaint); pursuant to Section 14(i)

of the ESA (Count III of the Coles-Moultrie Counter-Complaint); and pursuant to Section 14(iii) of the ESA (Count IV of the Coles-Moultrie Counter-Complaint).

The substantive issue as to which supplier has the right to serve the customer was first raised by CIPS upon filing of its Complaint. The issue has been joined by the Coles-Moultrie Answer and Counter-Complaint. CIPS did not have to file its Complaint and could have elected to stand upon its claim that the Section 7 notice provided by Coles-Moultrie was not a valid Section 7 notice and/or was premature. Having elected not to, CIPS cannot now claim such notice is not valid because there is no need for service. The CIPS substantive Complaint recognizes the need to determine the electric service rights to the customer in question.

**B. THE CUSTOMER HAS REQUESTED ELECTRIC SERVICE BE  
CONSTRUCTED IN THE FIRST QUARTER OF 2004**

No one disputes Agracell, Inc., as the customer, has requested that the electric service be constructed in the second quarter of 2004. That quarter is upon us, as is the need for the electric service. Coles-Moultrie does not desire to delay the customer's need for that electric service construction nor does the Illinois Commerce Commission. Section 7 of the ESA is intended to foster the earliest possible decision regarding the electric service needs of a particular customer, as well as, the appropriate electric supplier for providing the same. That is the reason for the short time notice provided to respond to the Section 7

notice and if another electric supplier contests the right of the supplier providing the Section 7 notice to serve the purposed customer, then the disputing electric supplier must promptly file its claim with the Commission for resolution.

Nothing in the facts set forth in the pleadings now being considered by the Commission and ALJ pursuant to the CIPS Motion for Judgment indicates that the customer's request that the electric service construction start in the second quarter of 2004 or that the notice provided by Coles-Moultrie to CIPS of that customer request is premature. To claim that such is premature is to deny the validity of the customer request that construction commence in the second quarter of 2004.

**IV. THE SECTION 7 NOTICE PROVIDED BY COLES-MOULTRIE TO CIPS IS NOT PREMATURE**

**A. SECTION 7 SPECIFICALLY PROVIDES FOR A REQUEST FOR PROPOSAL FOR CONSTRUCTION OF ELECTRIC SERVICE**

Section 7 provides that whenever an extension of electric service is planned by a particular electric supplier, such as Coles-Moultrie in this case, the electric supplier is suppose to provide written notice to any other electric supplier who may be adversely effected by the "...proposed construction, extension or service." That is exactly what Coles-Moultrie did in the instant case. Nothing in the pleadings filed by either CIPS or Coles-Moultrie disputes the timing need of the customer. The Section 7 provisions clearly anticipate that the request for service will be a "proposal" regarding "proposed construction, extension or service".

CIPS cites Illinois Power Company v. Illinois Commerce Commission 39 Ill. 2d 406; 235 N.E. 2d 614 (1968) (Illinois Power/Monroe) as support for its position. Yet in Illinois Power/Monroe the Court found that Illinois Power was contacted in August 1964 regarding electric service to the subdivision, then on August 2, 1965, one year later, a Section 7 notice was given by both Monroe County Electric Cooperative and Illinois Power to each other regarding service to the proposed subdivision. Finally, in November 1965 the developer withdrew its request for service from Illinois Power and instead made a request to Monroe County Electric Cooperative for underground electric service. At the time of the hearing in March 1966, construction had not begun on any of the lots in the subdivision. The Commission in its decision dated March 8, 1966 found the Section 7 notice, given August 2, 1965, and more than 7 months prior to any construction on the subdivision lots, was not premature Illinois Power Company v. Monroe County Electric Cooperative, Inc. Ill. Com. Comm. ESA 1 & 2 (3-8-66). Thus, in the instant docket the lapse of time between the October 31, 2003 Section 7 notice by Coles-Moultrie to CIPS and the projected time period for construction of electric service set by the customer, Agracell, Inc., which is six to nine months later does not make the notice premature. Accordingly, Illinois Power/Monroe supra does not support the CIPS claim that the Section 7 notice in the instant docket is premature.

B. A SECTION 7 NOTICE IS NOT A PREREQUISITE TO COMMENCING THE EXTENSION OF SERVICE

The notice contemplated by Section 7 to an adversely affected electric supplier as the result of a proposed extension of electric service to a customer is not a prerequisite to the service extension. This principle is made clear by the fact that Section 7 provides that should the Section 7 notice not be given, then the adversely affected electric supplier has 18 months after completion of the construction of the service extension within which to file its substantive complaint with the Commission regarding the right to provide electric service to the customer. If the notice is given, then there is a 20 day period within which the adversely affected electric supplier must file its complaint raising a substantive issue regarding the right to provide the electric service. Thus, even if the Section 7 notice is considered premature, that notice does not prohibit raising the substantive claim of right to provide the electric service in question. The substantive claim made by CIPS to provide electric service to the customer, Agracell, Inc., is the pending issue in the docket. Coles-Moultrie has likewise filed a substantive claim with respect to its right to serve the customer's proposed electrical needs. The two electric suppliers accordingly dispute each others claim of right to provide for the proposed electrical needs of the customer, Agracell, Inc., and the Commission has jurisdiction of those contested claims. The customer's need for service is apparent and the Commission should timely resolve the substantive issue.

V. CIPS IMPROPERLY SEEKS A DECLARATORY RULING BY THE ILLINOIS COMMERCE COMMISSION REGARDING THE PROPER INTERPRETATION OF SECTION 7 OF THE ILLINOIS ELECTRIC SUPPLIER ACT

Until the Illinois Commerce Commission adopted Administrative Rule 200.220, the Commission held no authority to issue declaratory judgments Harrisonville Telephone Co. v. Illinois Commerce Commission 176 Ill. App. 3d 389; 531 N.E. 2d 43; 125 Ill. Dec. 864, 866 (5<sup>th</sup> Dist. 1988). Thereafter, the Commission adopted Administrative Rule 200.220 authorizing the Commission to issue declaratory judgments. However, the Commissioner's authority to issue declaratory rulings is limited. In this docket, CIPS requests the Commission to interpret the meaning of Section 7 with regard to the Section 7 notice. The Commission has no authority to interpret Section 7 for CIPS, particularly in the abstract, without benefit of all the facts regarding the need for electric service by Agracell, Inc. Resource Technology Corp. v. Commonwealth Edison Co 343 Ill. App. 3d 36; 795 N.E. 2d 936; 277 Ill. Dec.268 (1<sup>st</sup> Dist 3d Div. 8-6-03). Under the limited provisions of Rule 200.220 of the Commission Rules of Practice, declaratory rulings can only be given regarding the applicability of Section 7 to CIPS. We already know Section 7 is applicable to CIPS because CIPS is an electric supplier as defined by Section 30/3.5 of the ESA. Thus, CIPS is merely requesting the Commission to interpret the meaning of Section 7 regarding when notice should be given and in so doing to establish a bright line test. Such an interpretation would be in the abstract no less and not authorized by Rule 200.220.

In addition, the Commission must have substantially all of the facts available to it in order to consider a declaratory ruling with respect to Section 7 of the ESA. The facts the Commission now has before it show that the customer has requested a proposal for electric

service and requested that construction of the electric service commence in the second quarter of 2004. These facts show that the issue is imminent and pressing. Yet, if there are further facts not before the Commission no declaratory judgment can be rendered. In either instance, there is no basis for granting CIPS the relief sought by Count I of the Complaint.

Further, to adopt the CIPS interpretation of Section 7, one would have to ignore the clear and definite language of the statute regarding notice of the "proposed construction, extension or service" which would render the aforesaid language meaningless. Proper statutory interpretation requires that all words of the statute be given meaning and that no term be rendered superfluous or meaningless. Bonaguro v. County Officers Electoral Board 158 Ill. 2d 391; 634 N.E. 2d 712; 199 Ill. Dec. 659, 661-662 (1994)

In addition, the CIPS interpretation that there must be both an offer and an acceptance by the customer and supplier before there is a need for the Section 7 notice would defeat the public policy established by Section 7 to encourage early resolution of electric supplier service disputes for customers, would delay the time when the issue could be brought before the Commission for resolution, and would not further the interests of the customer.

#### VI. THE CIPS AUTHORITY DOES NOT SUPPORT THE POSITION PROPOSED BY CIPS

The CIPS authority does not support the position taken by CIPS with respect to Section 7 of the ESA. The case of Illinois Municipal Electric Agency v. Illinois Commerce Commission 247 Ill. App. 3d 857; 617 N.E. 2d 1363; 187 Ill. Dec. 642 (4<sup>th</sup> Dist. 1993) simply states that the Commission has no authority to issue a declaratory judgment. Yet CIPS requests a declaratory ruling from the Commission. Likewise, Resource Technology

Corporation v. Commonwealth Edison Co. 343 Ill. App. 3d 36; 795 N.E. 2d 936; 277 Ill. Dec. 268 (1<sup>st</sup> Dist. 3<sup>rd</sup> Div. 2003) notes that even though the Commission has adopted Administrative Rule 200.220 establishing a rule authorizing the Commission to issue declaratory rulings, the Commission cannot issue a declaratory ruling regarding the interpretation of a provision of the ESA and certainly cannot do so absent a complete and thorough disclosure of facts.

Likewise, Illinois Power Co. v. Illinois Commerce Commission 39 Ill. 2d 406; 235 N.E. 2d 614 (1968) involves a notice which was claimed to be premature. Yet at the time of the hearing no development had taken place and still the Commission and Courts did not consider the Section 7 notice premature. Likewise, CIPS cites Lihosit v. State Farm Mutual Automobile Insurance Co. 264 Ill. App. 3d 576; 636 N.E. 2d 625; 201 Ill. Dec. 193 (1<sup>st</sup> Dist. 2d Div. 1993) for the proposition that there is no justiciable issue in the docket. Yet in the Lihosit case the Plaintiff requested the Court issue a declaratory judgment with regard to whether or not the Plaintiff would be required to pay for the arbitrators used to determine an uninsured motorist claim against the Plaintiff's insurance policy. The Defendant insurance company admitted the Plaintiff would not have to pay for the arbitrators because the Defendant insurance carrier would do so, thereby mooted the issue. That is not the factual situation in this docket. CIPS does not agree that Coles-Moultrie is the appropriate electric supplier to Agracell, Inc. Rather, CIPS has filed its substantive claim requesting the Commission determine that CIPS is the appropriate electric supplier for the proposed customer. Thus, there is a justiciable issue regarding the appropriate electric supplier to the customer, Agracell, Inc.

CIPS claims that there are no facts and circumstances that have arisen requiring the

need for electric service. Such a claim ignores the fact that the customer has requested that construction of the proposed electric service commence during the second quarter of 2004. Based on the calendar, the second quarter of 2004 is currently upon us. These facts and circumstances give rise to a need to make the decision now regarding the appropriate electric supplier, not later. Accordingly, the case of Illinois Industrial Energy Consumers' Request for Declaratory Ruling Pursuant to 200.220 Re: Section 16-102 of an Act entitled "Electric Service Customer Choice and Rate Relief Law of 1997" Ill. Comm. Com. 98-0607 (March 10, 1999) is not applicable. There is an actual controversy regarding which electric supplier should provide the electric service to the customer in question which controversy has been initiated, not by Coles-Moultrie, but by CIPS.

Likewise, the case of Methodist Medical Center v. Taylor 140 Ill. App. 3d 713; 489 N.E. 2d 351; 95 Ill. Dec. 130 (3d Dist. 1986) does not aid CIPS. No new rights will be established by the Commission making a determination as to which electric supplier is appropriate to serve the customer. Rather, if the Commission adopts CIPS' position with regard to the Section 7 notice, then a Section 7 notice would never be given and the dispute could never be brought to the Commission's attention until a binding contract has been entered into between the customer and the electric supplier regarding the construction of and providing of electric service. Such is and was not the intent of Section 7 and the notice provided for therein.

WHEREFORE, Coles-Moultrie Electric Cooperative requests the following relief from the Illinois Commerce Commission:

- A. To deny the Motion for Judgment with respect to Count I of the CIPS

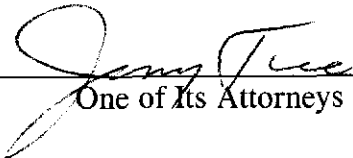
Complaint.

- B. To dismiss Count I of the CIPS Complaint with costs to be assessed against CIPS.
- C. For such other and further relief as the Commission deems just and equitable.

Respectfully submitted,

COLES-MOULTRIE ELECTRIC  
COOPERATIVE, INC.,

By: \_\_\_\_\_

  
One of Its Attorneys

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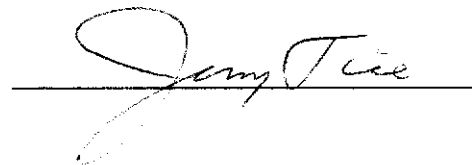
**PROOF OF SERVICE**

I, JERRY TICE, hereby certify that on the 2 day of April, 2004, I deposited in the United States mail at the post office at Petersburg, Illinois, postage fully paid, a copy of the document attached hereto and incorporated herein, addressed to the following persons at the addresses set opposite their names:

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A handwritten signature in cursive script, reading "Jerry Tice", is written over a horizontal line.